No. 16,455

United States Court of Appeals

For the Ninth Circuit

LUCY K. COHEN,
Appellant,

vs.

WESTERN HOTELS, INC., and
E. B. DEGOLIA,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

On the morning of August 14, 1957, appellant, Mrs. Lucy K. Cohen, who had been an overnight guest at appellee's Maurice Hotel, proceeded, accompanied by her daughter, across the lobby of the hotel toward a taxi waiting for her in front of the hotel. While walking across the lobby, she tripped and fell, injuring her knee.

Appellant contended that she tripped on a rug in the lobby and charged appellee with negligent placement of the rug. Her theory of liability was that

appellee was negligent in maintaining a hazardous and unsafe condition by permitting a wrinkle in the rug. Appellant further contended that she was not contributorily negligent in failing to see the 11 foot by 31 foot rug or by failing to see the wrinkle if any existed.

Appellant presented and qualified an expert witness and sought to introduce his opinion as to proper and safe manner of placing a rug on a floor. This opinion evidence was properly rejected by the court on the ground that the proper manner of placing a rug on a floor was within the knowledge of the average juryman and hence not a proper subject for expert testimony. Appellee offered no expert or inexpert opinion on the proper way to lay a rug, but rather introduced evidence showing that no wrinkle existed and that appellant was contributorily negligent in failing to see the rug.

When evidence was introduced showing that Western Hotels, Inc., had no interest of any kind in the Maurice Hotel and that the Maurice Hotel was solely owned by appellee, E. B. DeGolia, the court properly permitted an amendment of the pleadings to drop Western Hotels, Inc., as a party defendant. The jury was fully and adequately instructed, and returned a verdict for appellee.

RULINGS OF THE COURT BELOW.

1. The court did not rule that appellant's expert witness was not qualified or that he could not render

an opinion on a proper subject of expert testimony. The ruling was rather that he could not express an an opinion as to the proper and safe way to place a rug on a floor since this was a subject within the knowledge of the ordinary juryman and hence not a proper subject of expert testimony.

Out of hearing of the jury the court discussed the proposed expert opinion extensively with counsel (R. 66-76). At the close of this discussion, the court summarized the ruling, stating:

> "The Court. He can testify to what he saw as he saw it at the time and place in question. He can look at these photographs and I don't see how he is going to help you with those and tell us what he sees there . . ." (R. 73-74)

The court further stated:

> "The Court. He may be an expert in rug texture, that sort of business, and I am not prohibiting him from testifying about that, but if you want to ask if this is a safe or unsafe situation, I say to you, that is not a proper subject for expert testimony." (R. 75)

As indicated in this ruling appellant's expert was permitted to express various opinions on rugs. For example,

> "Q. (By Mr. Melchoir) Not this rug, but Chinese rugs in general, how they lie and are are placed on floors.
>
> A. Well, I would use the word 'experience' because I have confidence in myself to understand the word 'experience'. My experience teaches me the rug should have a pad." (R. 79)

"Q. (By Mr. Melchoir.) Mr. Yosiph, what is a foam rubber pad?

A. There are several kinds of foam rubber. I could tell by the way the term is applied to them. For instance, foam rubber, sponge rubber, solid rubber, and there are some pads are rubberized rubber; they are not 100 per cent rubber, so there are these different types of rubber pads used on the market in my shop as well as any other shop."

It is apparent that the witness was permitted to testify on general rug weave and rug qualities and that he was only prohibited from stating an opinion as to how to place a rug on a floor.

An objection to a hypothetical question inquiring into the adhesion properties of a rug when a person weighing 150 pounds walks across it was also sustained (R. 92). The basis of this ruling is clear since the witness himself testified that he had no experience with adhesive tests or with adhesive properties of rugs.

"Q. Did you ever make any tests about rugs lying on the floor?

A. Your Honor, may I say just one word in reference to the word 'test' and to the word 'adhesive'? These are two scientific words. I don't want to be involved in them. Why don't we talk plain English? Put the pad and put the rug on top of the pad? That is the question to be discussed. Adhesive tests, I am not a laboratory."

The soundness of this ruling appears to be too clear to be called into question.

Despite the obscuration attempted in appellant's brief, the basic ruling seems plain. The admittedly qualified expert of appellant was not permitted to testify to a matter within the knowledge of the ordinary juryman.

2. The testimony of Mr. Hoffer, the manager of the Maurice Hotel, was not opinion evidence and was properly admitted.

Mr. Hoffer testified that in the 12 years in which the rug had been on the floor of the lobby of the hotel, there had been no prior accidents. This was proper evidence, but even assuming that there were grounds for objection, no objection was made. Appellant has implied on page 6 of her brief and stated on page 25 of her brief that this evidence of no prior accidents was objected to. It is submitted that this is a plain misstatement of the record. The record states:

> "Q. Has anyone else ever fallen and presented a claim as a result of those rugs?
>
> A. In the 15 years I have been, 12 years the rugs have been laid, never any problem.
>
> Q. What is the condition of the rug at the present time?
>
> Mr. Melchoir. I object.
>
> The Witness. It is in good shape.
>
> The Court. Well, the objection is overruled. It's in good shape—of course, the basis of your objection, Mr. Melchoir, is that it is not material because it isn't at the time of the accident. Now, I would like the jury to understand the basis of my ruling. The basis of my ruling is that if that is the same rug and it is in good shape, the fair

inference can be drawn that at the time of the accident it was in good shape." (R. 183-184.)

It seems apparent that the objection was not to the evidence that there had been no prior accidents, but rather to the testimony as to the condition of the rug. The record further shows that prior to the unobjected to statement by Mr. Hoffer that there had been no prior accidents, the same testimony was elicited from Richard S. Carter, a bellman at the hotel. Mr. Carter testified as follows:

"Q. Have you ever seen anyone or known of anyone falling in the lobby before?

A. No." (R. 157.)

He further testified:

"Q. Nobody ever fell, did they, as a result of catching their heels until this happened?

A. No, no. Sometimes when there was a little rain or something, it would curl up a little. Why, a time or two I have seen a man walk across it, but I have never seen a woman catch her high heel on it at all." (R. 166.)

This testimony was admitted without objection.

The basis of the ruling that Mr. Hoffer's testimony that the rug at the time of the trial was in good condition was well stated by the court and needs no further amplification. It is clearly not a matter of expert testimony. The witness saw the rug and reported to the jury what he saw. It is noted that the court extended to appellant's witness Yosiph the same opportunity.

> "The Court. He can testify to what he saw as he saw it at the time and place in question." (R. 78.)

Appellant, however, did not see fit to ask her witness what the condition of the rug was at the time he observed it.

Mr. Hoffer did not express an opinion, expert or otherwise, as to the proper way to lay a rug. The question to which Mr. Hoffer responded was simple and called for a direct observation.

> "Q. Now, do the pads come out completely out to the edge or side edge of the rug?" (R. 179.)

Mr. Hoffer answered the question, but also digressed and stated *why* he, as manager, had not placed the pad out to the edge of the rug.

> "A. No, the pad does not come out to the edge of the rug. If they did, it would be all wrong. You have to allow for the drop of the rug to come down, depending on the thickness of the rug. Why, you've got to cut your pad further back so that you will allow a contour to it and depending on the thickness of your padding, if you use a 40 ounce felt rubber, or other equipment, it has to have a certain spread." (R. 179.)

This was clearly not an expression of expert opinion, nor was it underlined and dignified as expert opinion. It is simply the manager of the hotel stating why he was motivated to place the rug in the way he did. Of course it might be objected that the rug *was* placed

the way it was and that his reasons for doing so are irrelevant. However, this testimony was not objected to on the ground of irrelevancy, but rather on the ground that it was not the proper subject matter of expert testimony. Since Mr. Hoffer was not put forward as an expert on rugs by appellee and was not offering an expert opinion or any kind of an opinion, the objection was clearly without merit. It has long been held that an objection must state the proper grounds.

Appellant, throughout her brief, has repeatedly attempted to mislead the court by an alleged contrast between the admission of the hotel manager's statement as to why he laid the rug the way he did and the rejection of appellant's expert opinion on how to lay a rug and in so doing has attempted to impugn the impartiality of the court below. The record, however, reveals this as a tactic to obscure the plain ruling of the court below that expert opinion on how to lay a rug on a floor is not a proper subject for expert testimony.

3. The court below gave appellant a fair and impartial hearing and assisted appellant in the presentation of her case.

Some of the rulings favoring appellant are indicated in the record on appeal at pages 83, 85, 182, 104. When appellant was unable to elicit testimony from her expert witness, Yosiph, concerning his qualifications, the court came to appellant's assistance and aided her in direct examination (R. 80, R. 124).

The court's mild rebuke to appellant—"We don't tolerate that kind of argument." (R. 107) was amply justified in furtherance of the orderly administration of justice. Appellant had introduced as a witness a process server who testified that he had attempted to locate a photographer who had taken pictures of the hotel lobby and that he had been unable to locate the photographer. Although this testimony appeared to be irrelevant, the court allowed appellant to proceed. On cross-examination, appellee asked the witness if he had the telephone number of the photographer that he had attempted to serve, and, when he replied that he had not, appellee's counsel gave him the phone number. Appellant then stated:

> "Mr. Melchoir. There is no proof that counsel has given this witness the right telephone number.
>
> The Court. The objection is overruled. We don't tolerate that sort of argument."

4. The court properly and fully instructed the jury on the elements of negligence and contributory negligence and was fully justified in rejecting the argumentative instructions called for by appellant.

SUMMARY OF ARGUMENT.

The issues on appeal are of course not the negligence of appellee or the contributory negligence of appellant, but rather the propriety of the rulings and instructions of the court below.

The first issue is: Was it an abuse of discretion for the trial court to rule that the proper method of placing a rug on a floor is a matter of common knowledge and hence not a proper subject for expert opinion? Appellant relies heavily on Rule 43(a), Federal Rules of Civil Procedure and dwells upon the court's statement that it was not a state court of California. There seems little doubt that Rule 43(a) is to be taken according to its plain language and that it calls for the law which favors admission. However, law of either jurisdiction rejects the testimony presented by appellant and hence it is both impossible and inconsequential to determine which law should be applied.

The second issue is: whether objections to the admission of evidence not properly made at the time of trial may be raised for the first time on appeal. As previously indicated the objection to testimony concerning the absence of prior accidents which appellant now urges on the court, was not made at the time of trial and the objection to the hotel manager's unsolicited remark as to his purpose in laying the rug the way he did, was not made on the proper ground of irrelevancy.

The purportedly paradoxical admission of testimony by the hotel manager as to why he laid the rug the way he did and the rejection of the opinion of Yosiph as to the safety of the rug is a paradox only to appellant and clearly involve unrelated problems.

The admission of the hotel manager's testimony as to the condition of the rug at the date of the trial

was admittedly objected to, and appellant makes much of the irrelevancy of this testimony on the ground of the impermanency of the rug installation. This position might have merit if the testimony that the rug was in good condition related to whether or not the rug had had wrinkles, which might or might not be permanent, but the gist of the testimony was rather that the rug was in good condition in the sense of not being scarred or worn, hence it would appear reasonable that if it was not scarred or worn at the time of trial, it was also not scarred or worn at the prior time of the accident.

The third issue presented is whether or not it was error for the court to permit appellee to amend his pleading and to dismiss as defendant a party who was shown by the evidence to have no connection with the litigation. Whether or not Western Hotels, Inc., was an additional defendant was of no consequence to appellant in the presentation of her case and is certainly of no consequence now in view of the result. The prejudice to appellant is hard to imagine and is in fact non-existent.

The fourth issue presented is whether or not a court is required to give argumentative instructions submitted by the parties.

The fifth issue presented is whether or not it was proper for the court to use the term "insurers" when the meaning and use of the term was fully and adequately explained.

ARGUMENT.

I. THE OPINION OF YOSIPH ON HOW TO LAY A RUG PROPERLY ON A FLOOR WAS PROPERLY EXCLUDED UNDER EITHER FEDERAL LAW OR CALIFORNIA LAW.

The recent case of *Duff v. Page,* 249 Fed. 2d 137, decided by this court in 1957 is virtually on all fours with the present litigation. In *Duff,* the opinion of the operator of a towing truck as to the proper manner to remove an automobile and a trailer from a snowbank without placing the wrecker on the highway was held to have been properly rejected. The court stated at page 140:

> "Expert testimony is appropriate when the factual issue is one which jurors would not ordinarily be able to determine without technical assistance."

And further:

> "It is for the trial court in the exercise of a sound discretion to determine whether expert testimony is appropriate under the particular circumstances of the case."

The concurring opinion needs no further emphasis.

A. Under Federal Law the opinion of Yosiph on laying the rug was inadmissible.

Despite appellant's argument to the contrary, it seems apparent that under the federal cases Yosiph's opinion as to the safety of the rug must be considered an opinion relating to facts within the knowledge of an ordinary person and hence inadmissible.

A review of the authorities cited by appellant serves as ample indication of the weakness of her

position. In *Garford Trucking Corporation v. Mann,* 163 Fed. 2d 71 (1st Cir. 1947) cited on page 20 of Appellant's Brief, no expert testimony was introduced or considered in the opinion. In *Peoples Gas Company of Kentucky v. Fitzgerald,* 188 Fed. 2d 198 (6th Cir. 1951) cited on page 20 of Appellant's Brief, appellant stated that the service manager of a gas company was allowed to give his opinion as to the cause of an explosion. This is not a correct reading of the case. The qualifications or identity of the expert witness were not made clear in the opinion and there is no indication that it was Grow, the service manager, who testified. In *Builders Steel Company v. C. I. R.,* 179 Fed. 2d 377 (8th Cir. 1950), page 21 of Appellant's Brief, the case was tried before a court without a jury. In *Detroit T & I. R. Co. v. Banning,* 173 Fed. 2d 752 (6th Cir. 1949), page 21, Appellant's Brief, the expert testimony improperly excluded was the opinion of a conductor and an engineer as to the normal method of switching railroad cars. The court stated at page 756:

> "The proper operation of a railroad involves a combination of factors not within the knowledge of the average juryman."

The only comment that needs to be made is that everyone owns a rug, not everyone owns a railroad.

In *Een v. Consolidated Freightways,* 220 Fed. 2d 82 (8th Cir. 1955, page 21, Appellant's Brief, the testimony admitted was that of a deputy sheriff who had observed the position of vehicles after collision and was permitted to give his opinion as to the

point of impact. This would admittedly be a holding in favor of appellant's position if it were not for the fact that the court stated that the expert opinion was improper since it concerned a subject within the average man's knowledge, but that the otherwise valid objection was waived by a failure to make a proper objection to the opinion testimony at the time it was offered.

In *New York Life Insurance Company v. Wolf(e),* 85 Fed. 2d 182 (8th Cir. 1936), page 21, Appellant's Brief, the court actually reversed the verdict below on the ground of the improper *admission* of expert opinion. The suit was on a life insurance policy on which there was an admitted misrepresentation in the application. The defense to the misrepresentation by the plaintiff was that a legible copy of the application was not attached to the policy as required by South Dakota Law. Two doctors, eye, ear and nose specialists, were permitted to testify that in their opinion, a normal person could not read the print in the reduced size photostatic copy. This expert opinion was admitted by the trial court and the 8th Circuit reversed the verdict on the ground that the admission was improper, stating at page 166:

> "An obvious appearance of physical fact needs no elucidation by an expert."

In *Larkin v. May Department Stores,* 250 Fed. 2d 948 (3rd Cir. 1958), page 21, Appellant's Brief, the issue was the propriety of granting an involuntary dismissal. The court reversed, stating at page 116:

"It is well settled law that cases are not to be lightly taken from the jury."

In *Bratt v. Western Air Lines,* 155 Fed. 2d 850 (10th Cir. 1946), page 21 of Appellant's Brief, the expert testimony improperly excluded was that of an aircraft mechanic whose opinion was offered as to whether the right horizontal stabilizer of the aircraft was the first part to fail in flight. As in the railroad case above, this question was clearly outside of the knowledge of the average juror. The issue in the *Bratt* case was not whether the question was within the knowledge of the average juror, but rather as to the qualifications of the expert. In *Phillips Petroleum Company v. Payne Oil Corporation,* 148 Fed. 2d 546 (10th Cir. 1944), page 22 of Appellant's Brief, expert testimony was presented on both sides that certain expenses were either "drilling expenses or operational expenses" within the meaning of the contract relating to an oil well drilling concern. In *Shipley v. Pittsburg and L.E.R. Company,* 83 Fed. Supp. 722 (W. D. Pa. 1949), page 22, Appellant's Brief, the expert testimony concerned the interpretation of standard working agreements between employees and railroads generally for purposes of interpreting the collective bargaining contract. In *Ferris v. Interstate Circuit, Inc.,* 116 Fed. 2d 409 (5th Cir. 1941), page 22, Appellant's Brief, the action was on a fall by plaintiff in a theatre due to a defective floor condition. The building manager and an architect were permitted to testify for defendant that the theatre and the theatre plans and construction were of a standard design and

were reasonably safe. The court reversed the directed verdict for defendant, stating that the expert testimony was improperly admitted, stating at page 412:

> "An expert is not permitted to state his opinion on matters of common knowledge."

And further, at page 412:

> "The opinion they offered concerning the safety of construction invaded the province of the jury and, as the unconflicting testimony and the photographs clearly portray the conditions existing at the scene of the accident, the jury was fully competent to determine the question before it as any architectural or other expert."

In *Empire Oil & Refining Company v. Hoyt,* 112 Fed. 2d 356 (6th Cir. 1940), page 22 of Appellant's Brief, again the expert testimony was highly technical and clearly outside the knowledge of the average jury. In *McReynolds v. National Woodworking Co.,* 26 Fed. 2d 975 (D.C. Cir. 1929), page 23, Appellant's Brief, the basis of the trial court's exclusion of the expert testimony was that it was substantively irrelevant. The circuit court disagreed as to the elements of the plaintiff's cause of action and reversed on that basis. In *Ekblom v. Reed,* 71 Fed. 2d 399 (5th Cir. 1934) the court reversed a directed verdict on the ground that an opinion as to the proper manner of unloading a boiler was proper and was not within the knowledge of the average jurymen. In *United States Smelting Company v. Perry,* 166 Fed. 407 (8th Cir. 1909) the court affirmed a plaintiff's verdict and the admission of opinion testimony that the normal, safe

method of constructing a scaffold was either by use of a "footlock" or the nailing down of one end of the planking. The court stated at page 411:

> "The true test being not the total dependence of the jury on such testimony, but their inability to judge for themselves as well as the witness."

The court further stated, at page 411:

> "Reference to the cases will show the extent of this qualification, its application . . . and the discretion of the trial judge in this regard."

It appears clear that the cases cited by Appellant do not support her contention.

Federal cases have long held that expert opinion is not admissible where the jury is as capable of deciding the matter as the expert witness. The leading case of *Milwaukee & St. Paul Railroad v. Kellogg,* 94 U.S. 469, 24 Law. Ed. 256, was decided by the Supreme Court in 1877 and since that time the general rule has been well established. In *Milwaukee* the action was to recover for fire damage to the plaintiff's saw mill allegedly caused by sparks from the defendant's steamboat. The defendant had attempted to introduce the opinion of experienced fire insurance men that the nearness of the lumber to the mill created a fire hazard. The court upheld the rejection of the opinion on the ground that "the subject of proposed inquiry is a matter of common observation" (page 471).

Accord:

Schmeider v. Barney, 113 U.S. 645, 28 Law. Ed. 1130 (1885).

The next major Supreme Court case on the issue was *Island and Seaboard Coasting Co. v. Polson,* 139 U.S. 557, 35 Law. Ed. 270 (1891). The court stated at page 656:

> "The question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be determined by the jury depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which therefore no opinions of witnesses were admissible."

In *Spokane and I.E.R. Co. v. United States,* 241 U.S. 344, 60 Law. Ed. 1037 (1915) the court followed its earlier decisions and upheld the 9th Circuit's affirmance of the district court's rejection of the testimony offered by defendant railroad safety engineers to the effect that railroad cars were safe without iron grabholds at the ends of the cars.

In *U. S. v. Spalding,* 293 U.S. 498, 79 Law. Ed. 617 (1934) the essential holding of the court was that expert testimony offered invaded the province of the jury when it encompassed the ultimate issue. The plaintiff's suit was on a policy of war risk insurance, claiming total disability and doctors were permitted to testify that in their opinion the plaintiff was totally disabled. The Court reversed, stating at page 504:

> "The experts ought not to have been allowed to state their conclusions on the whole case."

Ninth Circuit cases under the *Spalding* doctrine include *U. S. v. Baker,* 73 Fed. 2d 691 (9th Cir. 1934), *U. S. v. Stevens,* 73 Fed. 2d 695 (9th Cir. 1934),

U. S. v. Sullivan, 74 Fed. 2d 799 (9th Cir. 1935), *U. S. v. Harris,* 79 Fed. 2d 341 (9th Cir. 1935), *U. S. v. Triandaplous,* 88 Fed. 2d 957 (9th Cir. 1937).

Walker v. Dante, 58 Fed. 2d 1076 (D. C. 1932) is factually similar to the present case. There the plaintiff tripped and fell over a 1½ inch rise on a sidewalk on the premises of the defendant. Even though a detailed diagram of the premises and the sidewalk was shown to the jury, a civil engineer's opinion was offered to the effect that this was unusual sidewalk construction. A directed verdict for defendant was reversed on other grounds, but the rejection of this expert testimony was upheld on the ground that the jury was as competent to answer the question as the witness. As it was with sidewalks, so it is with rugs. Both are within the common experience of the average juryman. At page 1077, the court stated:

> "It does not require a skilled expert to inform the jury as to when the streets or sidewalks are in a safe or dangerous condition."

A further District of Columbia case which aptly illustrates the Federal rule is *Kenney v. Washington Properties,* 128 Fed. 2d 612 (D. C. 1942). The plaintiff in *Kenney* allegedly fell out of a window of defendant. Two architects were called, fully qualified as experts, and testified that they had examined decedent's hotel room, the window, the height of the sill, the manner of locking the window, the manner of raising and lowering the window, and that in their opinion this type of window was unusual and unsafe. The trial court struck the testimony, instructed the

jury to disregard it and directed a verdict. The Circuit Court affirmed.

Accord: *Lake v. Shenago F. Co.* 160 Fed. 887 (8th Cir. 1909), *Hunt v. Kyle,* 98 Fed. 49 (7th Cir. 1899), *Henion v. New York, N. H. & H. Railway Company,* 79 Fed. 903 (2nd Cir. 1880). Also accord: *Hinkel v. Varner,* 138 Fed. 2d 935 (D. C. 1943).

In *Giffin v. Ensign,* 234 Fed. 2d 307 (3rd Cir. 1956) the expert opinion of a police officer as to the point of impact of two motor vehicles was excluded by the trial court. The Circuit Court affirmed the exclusion, stating at page 314:

> "But since the officer did not see the impact, the exact place of impact was clearly a matter of opinion and further one on which the jury was capable of drawing its own conclusion."

The basis of all these decisions seems clear. If the opinion of the expert witness is of value to the jury, it should be admitted; but if the facts are available to the jury and if the facts are within the understanding of the ordinary juryman, the expert opinion is of no value and should be rejected. This is aptly summed up by Wigmore, Volume 7, page 21, 3rd edition:

> "But the only true criterion is: on *this subject* can a jury from *this person* receive appreciable help" (Mr. Wigmore's emphasis).

It is submitted that the above cases will support the proposition that expert opinion on how to place a rug is inadmissible.

B. Under California Law the opinion of Yosiph was inadmissible.

Appellant cites the California Code of Civil Procedure, Section 1870 (9) and numerous California cases to the effect that an expert witness, in order to be properly qualified does not need to be a member of a learned profession and is not required to have an academic background. This is undoubtedly the law in the Federal jurisdiction as well as in California, and has been the law for some considerable time. However, it is apparent that appellant's belaboring of this point does not make it any more relevant to the present case. The issue here is not whether a tradesman can be an expert witness, since appellant's witness was *permitted* to testify as an expert witness (R. 73). The issue is whether or not this admittedly expert and admittedly qualified witness can state an opinion as to the proper way to place a rug on a floor. The cases cited by appellant indicate that this opinion would be no more permitted in California than it would be in the Federal courts.

In *George v. Bekins Van & Storage,* 33 C. 2d 834, 205 P. 2d 1037, page 16, Appellant's Brief, the court presents a clear analysis of the problem. In *George* the Supreme Court upheld the trial court's admission of expert testimony as to the origin of a fire in defendant's warehouse, stating at page 844:

> "The possible causes of warehouse fires are sufficiently beyond the common experience of the ordinary judge or juror to justify the admission of expert opinion testimony on that issue."

The court cites several fire cases of which some held the expert testimony on the origin of the fire admissible, while others held the expert testimony as to the origin of the fire inadmissible. The analysis of Justice Traynor is consistent with that of the U. S. Supreme Court in *Milwaukee & St. Paul Railroad v. Kellogg,* supra, which reached the opposite conclusion and excluded the expert opinion there presented on the origin of the fire. The distinction is that it depends on the particular fire and the facts of the particular case. The basic question is whether or not this is a type of fire which is within the knowledge of the ordinary jury. Some fires are and some fires are not; the question is basically a determination of fact.

Rodela v. Southern California Edison Co., 148 C. A. 2d 708, 307 P. 2d 436 (1957), page 16, Appellant's Brief, is a later decision in this same line of cases. The expert opinion there was to the effect that the factory fire was not an electrical fire, but "that the pole was set afire by continuing application of heat", at page 713. The admission seems clear on the ground that this type of fire was outside of the knowledge of the average juryman.

In *Manney v. Housing Authority of Richmond,* 79 C. A. 2d 453, 180 P. 2d 69 (1947) the trial court's admission of opinion evidence on the origin of the fire was approved. The two lines of decisions were recognized and the decisive issue of the average juror's knowledge was recognized. The court quoted an Ohio decision to the effect that "it must not be supposed that there is any rule of evidence concern-

ing the opinions of witnesses which is peculiar to fences, highways, bridges or steamboats or to any other special subject of investigation. Where the facts concerning their condition cannot be made palpable to jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by facts supporting them as they may be able to place intelligently before the jury." (pages 460-461.) Cases supporting the admission of expert testimony on the origin of fires are collected in 131 A.L.R. at page 1124, column 1, and cases holding the expert testimony inadmissible in column 2 of the same page.

All of the cases cited by appellant support the position that the proper subject matter of opinion testimony is a question of fact which is properly left to the discretion of the trial court. In *People v. Martinez,* 38 C. 2d 556, 241 P. 2d 224 (1952), page 16, Appellant's Brief, the admission of opinion testimony by a psychiatrist that the criminal defendant could "function normally with a 2.35% alcohol content in his blood" was upheld. In *People v. Wilson,* 25 C. 2d 341, 153 P. 2d 720 (1944), opinion testimony of a physician that there was no necessity for performing an abortion was upheld. In *People v. King,* 104 C. A. 2d 298, 231 P. 2d 156 (1951), page 16, Appellant's Brief, similar technical medical testimony was upheld. In *Eger v. May Department Stores,* 120 C. A. 2d 554, 261 P. 2d 281 (1953), page 17, Appellant's Brief, the court affirmed a verdict for defendant and affirmed the trial court's factual conclusion that ex-

pert testimony as to the maintenance of parking lots should be permitted on the ground that it is not within the experience of ordinary persons. In *Campbell v. Wong Fon,* 141 P. 2d 43 (1943), the court affirmed the judgment for the plaintiff and affirmed the trial court's factual decision that the proper method of constructing and using a scaffolding was not within the knowledge of the ordinary juryman. All of these California decisions find close analogies in the federal jurisdiction. The rule is fundamentally the same in both: the trial court must determine under the facts of the particular case whether or not the expert testimony is within the knowledge of the average juryman.

In *Wallace v. Speier,* 60 C. A. 2d 385, 104 P. 2d 900 (1943), page 18, Appellant's Brief, the court upheld the admission of a plumber's testimony on the proper way of maintaining plumbing fixtures. The court at page 395 quoted an earlier Supreme Court decision to the effect that:

> "This is a question largely for the determination of the trial judge and his ruling will not be disturbed unless error clearly appears."

In *Fonts v. Southern Pacific Co.,* 30 C. A. 633, 159 P. 215 (1916) the court again affirmed the factual determination of the trial judge that the proper method of unloading a heavy shafting was not within the knowledge of the average juror. In *People v. Carter,* 48 C. 2d 733, 312 P. 2d 665, page 18, Appellant's Brief, the court approved the admission by the trial

court of testimony of a medical doctor that he had conducted experiments of blood dynamics and had formed an opinion as to how blood had spattered from the murder victim. In *McLain v. Dahlstrom Door Co.,* 19 C. A. 475, 126 P. 391 (1912), page 18, Appellant's Brief, the trial court's factual determination that the propert kind of knot to be used on an elevator was not within the knowledge of the average juryman. In *Burch v. Valley Motor Lines, Inc.,* 78 C. A. 2d 834, 179 P. 2d 47 (1947), page 18, Appellant's Brief, the court held that the opinion testimony of an associate professor of mechanical engineering should have been admitted as to the cause of a metal bar distorting and shearing.

In *Oakes v. Chapman,* 158 C. A. 2d 78 (1958), page 18, Appellant's Brief, the First District Court of Appeal in a well-reasoned decision, upheld the trial court's admission of expert testimony as to the consequences of hitting a golf ball. The court stated at page 82:

> "In close situations the admissibility of expert testimony is frequently a matter in the discretion of a trial court."

and further quoting an earlier Supreme Court decision:

> "It is for the trial court to determine in the exercise of a sound discretion the competency and qualification of an expert witness to give his opinion in evidence, and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown."

As it is in California and in the Federal courts, so it is in every jurisdiction: the factual determination of whether the subject matter of expert opinion is within the knowledge of a juror is properly left to the trial court, and a verdict rendered upon the evidence so rejected or accepted will not be reversed on appeal. On Page 19 of her brief, appellant cites a New York case and states that this is a reversal of a jury verdict. It does not appear in the Per Curiam report whether the judgment was the result of a jury verdict or a directed verdict on insufficient evidence. The opinion, however, reads as if the reversal were based on a directed verdict of nonsuit below. At page 19 the New York court stated:

> "There was evidence from which the jury could have found that the throw rug was in a defective condition."

and further

> "On the whole case the question of the defendant's negligence and the plaintiff's freedom from contributory negligence was for the jury."

Apparently the court was reversing a directed verdict.

A recent First District decision upholding the rejection of proffered expert testimony is *Baccus v. Kroger,* 120 C. A. 2d 802, 262 P. 2d 349 (1953). In *Baccus* a structural engineer was qualified as an expert and permitted to testify that the sidewalk was in a dangerous condition. Although the verdict for plaintiff was affirmed the court disapproved the admission of this expert testimony, stating at page 804:

> "Obviously, whether the sidewalk was in a safe condition for pedestrian use was a question for the jury and not for an engineer."

Wilkerson v. City of El Monte, 17 C. A. 2d 615, 62 P. 2d 790, is in accord on the particular factual determination of the safety of city streets. The condition of a sidewalk seems quite analogous to that of a rug, but in any event it appears obvious that this determination is properly left to the trial court.

Blinkinsop v. Webber, 85 C.A. 2d 276, 193 P. 2d 96 (1948) is in accord in the exclusion of expert testimony of a civil engineer as to whether apartment house steps were safe. *McStay v. Citizens National Bank,* 5 C.A. 2d 595, 43 P. 2d 560 (1935) is in accord in disapproving the admission of an expert opinion as to the safety of hotel steps.

It appears that in California there is no authority contrary to the proposition that an expert witness may not testify as to matters within the knowledge of the ordinary juryman and that the determination of whether or not the proposed opinion is within this scope of knowledge is properly left to the sound discretion of the trial court.

II. OBJECTIONS TO THE ADMISSION OF EVIDENCE NOT PROPERLY MADE AT THE TIME OF TRIAL MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

A. The testimony as to the absence of previous accidents by appellee's witnesses Carter and Hoffer was not objected to and is hence clearly admissible.

As indicated above there was no objection to the testimony of either Mr. Carter or Mr. Hoffer that during their years of work in the hotel they had never before had knowledge of a similar accident. It has long been the uniform holding that evidence must be objected to at the time of trial. A recent Eighth Circuit case which aptly summarizes this well established rule is *Een v. Consolidated Freightways,* 220 Fed. 2d 82 (1955). The court stated at page 88:

> "It is essential to a review of the ruling on the admissibility of evidence that a specific objection be made in the trial court sharply calling the ground relied upon to the attention of the court and on appeal the objection interposed must be relied upon."

Accord: *Southern Pacific Company v. McCready* (9th Cir. 1931), 47 Fed. 2d 673; *U. S. v. Nickle* (8th Cir.), 70 Fed. 2d 873; *Cockerell v. U. S.* (8th Cir.) 74 Fed. 2d 151; *Oslund v. State Farm Auto Ins. Co.* (9th Cir. 1957), 242 Fed. 2d 816; *Metropolitan Life Ins. Co. v. Armstrong,* 85 Fed. 2d 187 (8th Cir); Simpkins Federal Practice, 3rd Edition, Section 581; *Noonan v. Caledonia Gold Mining Co.,* 171 U. S. 393, 7 S. Ct. 911 (1887). This principle appears too clearly established for further discussion.

The narrow exception to this rule is the "plain error" doctrine. However, there is no "plain error"

in the present situation since the evidence would have been admissible even if objected to. In *Chicago, Rock Island and Pacific Railway Co. v. Lint* (8th Cir. 1954), 217 Fed. 2d 279, the court stated at page 283:

> "Defendant has introduced uncontroverted evidence that for many years it used the same type of hinge similarly installed at all its yards and that farm gates in the territory are generally so equipped and that there has been no previous accident such as happened here. Such evidence is admissible and is very persuasive. . . ."

Accord: *Chesapeake and Ohio Railroad v. Newman,* 243 Fed. 2d 804 (6th Cir. 1957); *Farris v. Interstate Circuit, Inc.,* 116 Fed. 2d 402 (5th Cir. 1941), at page 411; *Hilleary v. Earle Restaurant, Inc.,* 109 Fed. Supp. 829 (D. C. 1952); *Martucci v. Brooklyn Children's Aid Assn.,* 140 Fed. 2d 732 (2nd Cir. 1944).

B. The testimony of appellee's witness Hoffer was not objected to on the proper ground of irrelevancy and cannot now be objected to on appeal.

It is apparent from the record as indicated above that appellant's objection at the time of trial that Mr. Hoffer's testimony was expert opinion was clearly without merit since Mr. Hoffer was explaining why he laid the rug the way he did and not expressing an opinion of any kind. It is possible that an objection might be raised as to the relevancy of this testimony, but as indicated in the *Een* case, supra, and the numerous other cases cited under *Een,* the proper grounds of objection must be stated. It is further submitted that the proper determination of relevancy

should be left within the sound discretion of the trial court. The relevancy of trivial fragments of evidence presented at trial is not within the proper scope of review of an appellate court.

III. APPELLEE WAS PROPERLY PERMITTED TO AMEND HIS PLEADING TO CONFORM TO THE EVIDENCE.

When evidence was introduced to the effect that Western Hotels, Inc., was unconnected in any way with appellee E. B. DeGolia or with the Hotel Maurice, the court properly permitted appellee to amend the pleadings to conform to the evidence.

Federal Rules of Civil Procedure, Rule 15(b) states:

> "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. But failure to so amend does not affect the result of trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."

It is obvious that appellant was not prejudiced in any way by the amendment of the pleadings to elimi-

nate Western Hotels, Inc., as a defendant. All the elements of their cause of action were the same, whether or not there was an additional defendant. E. B. DeGolia, is, of course, solvent, and able to satisfy any judgment without reference to any other party. In any event Western Hotels, Inc., is an unrelated party and could not be held liable whether the pleadings were amended or not. Furthermore, in view of the verdict, it would not matter whether there had been one or twenty defendants.

Furthermore, appellant did not object to the amendment of the pleadings (R. 177).

IV. THE INSTRUCTIONS OF THE COURT WERE ADEQUATE AND PROPER.

A. The court was not required to give argumentative instructions submitted by the parties.

A reading of the court's instructions will support their clarity and completeness without further argument. Appellant states that the charge on contributory negligence was confined to seven lines. It is, of course, obvious that the length of an instruction is not the point but rather the clarity and completeness of expression. However, the length of the contributory negligence instruction does appear misstated by appellant. There are three lines relative to contributory negligence at page 203 of the record, sixteen lines on contributory negligence at page 205, and ten lines on contributory negligence on page 206.

In their request for instructions, appellant cited *Laird v. Mather,* 51 Cal. 2d 210 (1959) (Page 31, Appellant's Brief) and demanded that dicta from the case be placed in the instruction. Requested instruction No. 18 might possibly be related to the *Laird* case. However, the other two instructions may only be very questionably derived from it. In any event, it seems plain that the case does not stand for the proposition that attorneys in State or Federal Court may insist upon argumentative instructions slanted in favor of their client.

The modern trend is clearly away from argumentative instructions, and it is doubtful if any modern case in any jurisdiction would support appellant's view. The general position of the California courts is summed up in 1 B.A.J.I. at page 4:

> "Although to thus instruct a jury and to do so clearly may require the assuming of possible findings of fact or the statement of hypothetical situations, it does not require for either side argumentive instructions dealing with specific details of evidence."

Southern Pacific Co. v. Guthrie, 180 Fed. 2d 295 (9th Cir. 1949) appears directly in point. There the court quoted the Supreme Court at page 301, as follows:

> "Perhaps some of the abstract propositions of defendant's counsel contained in the instructions asked for based on the facts assumed therein if such facts were conceded or found in a special verdict would be technically correct, but a judge

is not bound to charge upon assumed facts in the *ipsissima verba* of counsel nor to give categorical answers to juridicial catechism based on such assumption."

B. The court's use of the term "insurers" in the instruction was not improper.

Appellant contends that the court's use of the term "insurers" in the instruction insidiously implied that appellees were not insured and that this is a reference to the financial ability of one appellee. It is clear, however, if the instruction is read in its entirety, that the court fully and adequately explained what he meant by the term "insurers" and that its use did not carry the connotation that appellant is seeking to force into it. The court stated (R. 204):

> "Now the hotel proprietors, not only these hotel proprietors but others, folks that serve the public, are not insurers. They don't insure against injury and they don't carry that kind of legal responsibility. Mr. DeGolia and his wife, the defendants here, are going to be responsible and only, ladies and gentlemen of the jury, if they were negligent in their care and maintenance of the carpet in question at the time and place of this injury."

It would appear that this is a full and adequate instruction and aptly and in common language explains the duty of appellees.

In *Chicago, Rock Island and Pacific Railroad Company v. Lent,* 217 Fed. 2d 179 (8th Cir. 1954), the court expressly approved a proposed instruction that

used the word insurer and explained that the liability of defendant was not absolute. The instruction that was approved at page 284 contains the phrase, "This does not mean that defendant was an insurer against all mishaps that might occur nor that the properties where plaintiff would discharge his duties had to be maintained in a perfect condition." Accord: *Chicago St.P.M.M.&O. Railroad Company v. Arnold,* 160 Fed. 2d 1002 (8th Cir.).

Appellant states on the final page of her brief:

> "If references to insurance are to be kept out of casualty litigation care must be taken to avoid the inadvertent and greatly misleading inclusion in this manner so that laymen will properly understand the language of lawyers and judges."

This pious admonition appears ludicrous in light of appellant's blatant attempt to introduce the issue of insurance in her voir dire examination (Plaintiffs' Juror's Question No. 5, Record page 12).

CONCLUSION.

Under our system of justice even plaintiffs with doubtful cases are entitled to their day in court. Appellant here has had her day and yet she seeks to thrust upon this court a second factual determination of the issues which were resolved against her by the court and the jury below. Three days were spent in presenting evidence for the consideration of the jury. The learned trial judge properly excluded and admitted evidence, and carefully instructed the jury.

Appellant seeks now to overturn the carefully considered and obviously correct judgment against her, and to convert the Circuit Court into an arena for the retrial of factual issues.

Dated, San Francisco, California,
November 18, 1959.

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